No. 83-724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRENE GOMEZ-BETHKE, HUBERT H. HUMPHREY III, and GEORGE A. BECK,

Appellants,

—v.—

THE UNITED STATES JAYCEES,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN, CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND, EQUAL RIGHTS ADVOCATES, INC., WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK, WOMEN'S LAW PROJECT, AND WOMEN'S LEGAL DEFENSE FUND AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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Appellants,

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THE UNITED STATES JAYCEES,

Appellee.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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MOTION ON BEHALF OF THE NATIONAL ORGANIZATION FOR WOMEN, CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND, EQUAL RIGHTS ADVOCATES, INC., WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK, WOMEN'S LAW PROJECT, AND WOMEN'S LEGAL DEFENSE FUND FOR LEAVE TO FILE BRIEF AMICI CURIAE

The National Organization for Women and other amici respectfully move this Court, pursuant to Rule 36, for leave to file the accompanying brief amici curiae in support of the jurisdic-

tional statement submitted by Appellants Irene Gomez-Bethke, Commissioner, Minnesota Department of Human Rights, Hubert H. Humphrey III, Attorney General of the State of Minnesota, and George A. Beck, Hearing Examiner for the State of Minnesota. Consent to file the attached brief has been sought from the parties. While the Appellants have consented, the United States Jaycees has not. It is therefore necessary to request the permission of this Court.

NATIONAL ORGANIZATION FOR WOMEN ("NOW") is a national membership organization of 200,000 women and men in over 750 chapters throughout the country dedicated to assuring equal economic, social and political opportunity for all women. Since its founding in 1967, NOW has been the largest feminist membership

organization dedicated to combatting sex discrimination and removing barriers to women's full participation in all aspects of American society. The Minnesota Chapter of NOW participated as amicus curiae in this case before the Minnesota Supreme Court and in the Eighth Circuit. NOW recognizes the importance of equal access for women to organizations like the United States Jaycees which provide leadership development and management skills and facilitate entry into a network of influential business and community leaders.

CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND ("CWEALF") is a non-profit public interest law firm specializing in cases of sex discrimination. Since its inception in 1975, CWEALF has represented women in numerous cases including those

seeking equal access to organizations with discriminatory membership policies. CWEALF has also been active in educating women about their legal rights.

EQUAL RIGHTS ADVOCATES, INC. is a San Francisco based, public interest legal and educational corporation specializing in the area of sex discrimination. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. Equal Rights Advocates, Inc. has been particularly concerned with gender equality in career development because economic equality is fundamental to women's ability to achieve equality in other aspects of society.

The WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK ("WBASNY") is a

membership organization of approximately 2,000 female and male attorneys, law graduates and law students committed to the advancement of women's rights. WBASNY cooperates with and aids and supports organizations and causes which advance the status and progress of women in society. Full access by women to decision making positions is one of its primary goals.

The WOMEN'S LAW PROJECT ("WLP") is a non-profit feminist law firm dedicated to eliminating sex discrimination through litigation and public education. Since its founding in 1973, the Women's Law Project has been concerned with institutional barriers to the advancement of women at all levels of participation in society. WLP has represented women seeking admission to all

male educational institutions and community organizations, and strongly believes that participation in such organizations is fundamental to the ability of women to compete equally in business and community life.

The WOMEN'S LEGAL DEFENSE FUND ("WLDF") is a non-profit, tax-exempt membership organization, founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, and public education. WLDF's experience and knowledge -- gained from its members who, as professionals, are

disadvantaged by discriminatory membership policies and from its clients who are similarly disadvantaged by exclusion from community and business organizations -- have demonstrated that such exclusionary policies result in a diminution of employment opportunities.

Amici believe that this Court's decision will be important to the countless number of women who find their career and business opportunities circumscribed by the pervasive exclusion of women from full membership in established business, professional, and community service organizations. The accompanying brief will assist the Court to understand the impact of such exclusions on the ability of women to compete equally with men in career advancement and development.

Although many of the organizations which relegate women to inferior membership status claim they do no harm because they are purely social or altruistic, in fact, like the United States Jaycees, these organizations are places where important exchanges among business and professional colleagues occur. Such organizations provide settings in which individuals pursuing career-related ventures have opportunities to display their talents and refine their skills. Amici are concerned that if women are denied equal access to these organizations, they will be denied access to a

traditional avenue of economic and political opportunity and advancement.

Respectfully submitted,

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IRENE GOMEZ-BETHKE, HUBERT H. HUMPHREY III, and GEORGE A. BECK,

Appellants,

v.

THE UNITED STATES JAYCEES,

Appellee.

On Appeal from the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN, CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND, EQUAL RIGHTS ADVOCATES, INC., WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK, WOMEN'S LAW PROJECT, AND WOMEN'S LEGAL DEFENSE FUND AS AMICI CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont'd)

TABLE OF AUTHORITIES (Cont'd)

TABLE OF AUTHORITIES (Cont'd)

STATUTES AND CODES:

TABLE OF AUTHORITIES (Cont'd)

OTHER AUTHORITIES:

TABLE OF AUTHORITIES (Cont'd)

TABLE OF AUTHORITIES (Cont'd)

STATEMENT OF THE CASE

The United States Jaycees (the "U.S. Jaycees" or "Jaycees") is a civic organization of some 300,000 members with numerous local chapters nationwide. The U.S. Jaycees refuses to admit women to full membership, according them only associate status.[1/] The issues to be resolved in this case are whether application of the Minnesota Human Rights Act, prohibiting sex discrimination in places of public accommodation, to the Jaycees unconstitutionally interferes with the Jaycees' right of association and whether, as applied to the Jaycees, the Act is unconstitutionally vague.

Since 1974 and 1975, respectively, the Minneapolis and St. Paul

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1/ Associate members are ineligible to vote, hold office or receive awards.

chapters of the Jaycees have admitted women as full members, in violation of the rules of the national organization. When the national organization threatened in 1978 to revoke the charters of these chapters, the chapters filed charges with the Minnesota Department of Human Rights claiming violation of the Minnesota Human Rights Act, Minn. Stat. Ann. §§ 363.01-363.14 (West 1966 & Supp. 1983).[2/] Minn. Stat. Ann. §§ 363.03(3) (West 1966 & Supp. 1983) prohibits sex discrimination in places of public accommodation. Minn. Stat. Ann. § 363.01(18) (West 1966 & Supp. 1983) defines place of public accommodation to include "a business ... fa-

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2/ A suit filed by the Jaycees in federal district court seeking declarative and injunctive relief against state interference with their organization was dismissed without prejudice pending the decision of the Minnesota Department of Human Rights.

cility of any kind ... whose goods ... [and] privileges ... are ... sold or otherwise made available to the public."

Hearing Examiner George Beck held in-depth hearings on the claims against the Jaycees and on October 9, 1979 issued a decision finding that the Jaycees was a place of public accommodation whose discriminatory practices violated the Minnesota Human Rights Act. The U.S. Jaycees was enjoined from revoking the local chapters' charters and from discriminating against any members or applicants for membership on the basis of sex. Minnesota v. United States Jaycees (Minn. Dep't of Human Rights Oct. 9, 1979) ("DHR Findings") (Appellants' Appendix at A-93).

The Jaycees then instituted an action in federal district court claim-

ing that application of the Minnesota Human Rights Act violated a constitutionally-protected right of freedom of association, and, subsequently, that the Minnesota statute was unconstitutionally vague. Under the procedure of Minn. Stat. Ann. § 480.061(3) (West 1966 & Supp. 1983), the district court certified to the Minnesota Supreme Court the question of whether the Jaycees was a place of public accommodation within the meaning of Minn. Stat. Ann. § 363.01(18). The Minnesota Supreme Court answered affirmatively. United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981). The district court then upheld the application of the Minnesota Human Rights Act to the Jaycees, finding that the state's compelling interest in prohibiting sex discrimination outweighed any associational rights of the Jaycees

and rejecting the Jaycees' vagueness claim. 534 F. Supp. 766 (D. Minn. 1982).

A divided panel of the Eighth Circuit, Chief Judge Lay dissenting, reversed and held that the Jaycees' right of association was violated by application of the Minnesota Human Rights Act and, in the alternative, that the Act was unconstitutionally vague as applied. 709 F.2d 1560 (8th Cir. 1983). A petition for rehearing en banc was rejected by an equally divided Eighth Circuit on August 1, 1983. (Appellants' Appendix at A-131). The appeal to this Court ensued.

INTEREST OF AMICI

The interest of the amici curiae is set forth in the motion accompanying this brief.

QUESTIONS PRESENTED

I. May a federal court invoke the United States Constitution to invalidate the application of a Minnesota statute banning sex discrimination to a large, economically and socially influential civic organization that aggressively and indiscriminately solicits men between the ages of 18 and 35 as full members, but denies full membership to women? The court of appeals erroneously held that a right of freedom of association shields the discriminatory practices of such an organization even when the vast majority of the organization's activities are unconnected to any First Amendment exercise. This Court should reverse.

II. Is a Minnesota statute that bans sex discrimination in "a business ... facility of any kind ... whose goods ... [and] privileges ... are ...sold or otherwise made available to the public" void for vagueness, in its application by the highest court of the state to a large, economically and socially influential civic organization that discriminates against women? The court of appeals erroneously held that the application of the statute was void for vagueness because of the hypothetical difficulty that might arise in distinguishing the Jaycees organization from other organizations, not before the court, about whom the record was wholly undeveloped. This Court should reverse.

THE QUESTIONS ARE SUBSTANTIAL

I.

THE EIGHTH CIRCUIT'S OPINION UPHOLDING THE UNITED STATES JAYCEES' DISCRIMINATORY MEMBERSHIP POLICY HAS A SUBSTANTIAL IMPACT ON THE ABILITY OF WOMEN ACROSS THE COUNTRY TO COMPETE EQUALLY WITH MEN IN BUSINESS AND CAREER ADVANCEMENT

This case will determine whether the State of Minnesota can prohibit discrimination by the U.S. Jaycees, a national organization that operates a public business. When women are not offered equal access, when they are not welcomed as full members of such organizations, they are deprived of the advantages provided by the traditional avenues of self-development, economic and political opportunity, and advancement. Recent actions of several govern-

mental bodies[3] and organizations[4] reflect the growing public awareness of the importance of these service organizations to women's career advancement and full participation in the business and public life of the country.

3/ See, e.g., 410 Federal Personnel Manual 47 (1977) (federal personnel shall not participate in meetings held at facilities that discriminate on the basis of sex); Executive Order 17, State of New York (May 31, 1983), N.Y. Admin. Code, Tit. 9, part 1, sub. A, § 4.17 (state officials barred from conducting official business in sex discriminatory facilities); Philadelphia Code § 20-307 (1981) (no funds from Philadelphia Treasury may be used for business expenses arising from use of discriminatory facility).

4/ Organizations that have adopted policy statements prohibiting meetings at clubs with discriminatory membership policies include the American Bar Association (approved by its Board of Governors in October 1978); Association of the Bar of the City of N.Y. (approved April 9, 1981); American Jewish Congress (approved June 2, 1982).

The importance of such organizations is seen clearly in the operations of the U.S. Jaycees. Individuals join the Jaycees to enhance their career potential through leadership training opportunities and experience gained from running large-scale volunteer projects in an organization with high visibility and respect in the community. Local chapters are provided with materials for and implement programs in such areas as public speaking, personal dynamics, athletic championships and leadership training. Awards stimulate and grant recognition for achievement in these areas. The value of Jaycees' leadership training opportunities was summarized by John Kindrick, President of the Boston Jaycees who said, "My own value in the marketplace has increased dramatically by my Jaycee experience." Simpson, Jay-

cees Challenged on "Men Only" Rule, Working Woman, Sept. 1979, at 61, 68.[5/]

Women, even as associate members, cannot share fully in these programs. They are allowed and encouraged to work on Jaycees projects, but are denied the opportunity to lead the projects and are awarded no recognition for their work. Women are thus deprived of an important avenue for professional self-improvement, education, and recognition.

Jaycees members have high visibility in the community. At the national level, the U.S. Jaycees maintains

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5/ One Minnesota woman who joined the Jaycees at her supervisor's request describes the organization as offering probably the best leadership training for women in the country. The All Male Club: Threatened on All Sides, Business Week, Aug. 11, 1980, at 90, 91.

a strong public image. Through sponsorship of various types of community projects at the chapter level, members of the Jaycees enhance their status in their local communities and make useful acquaintances within the local power structure.[6/] Women need this kind of exposure if they are to equal the professional achievements of their male counterparts.

Women also seek full membership in the U.S. Jaycees because of the network of business contacts and opportunities that the Jaycees offers. See

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6/ Projects sponsored by the U.S. Jaycees include a CPR training program which is open to the public and a program in government affairs. DHR Findings Nos. 19, 20, Appellants' Appendix at A-103. In Minnesota, locally developed projects include an annual free Christmas dinner and the Patty Berg Gold Clinic. DHR Finding No. 20, Appellants' Appendix at A-104.

Schweich, No Women Wanted, McCall's Magazine, May 1980, at 65. See also Simpson, Jaycees Challenged on "Men Only" Rule, Working Woman, Sept. 1979, at 61. Networks have been described as "where the power really is ... the mechanism that gives men a chance to push the right buttons and meet the right people at the right time," O'Brien, Women Helping Women, Detroit Free Press, Nov. 13, 1978. Access to networks and contacts is an important factor in the difference in success between male and female managers. See Catalyst Staff, Making the Most of Your First Job (1981); Harragan, Pull, How to get it, How to use it, How to keep it, Mademoiselle Magazine, August 1982, at 192, 193; Bartlett, Poulton-Callahan, Somers, What's Holding Women Back?, Management Weekly, Nov. 8. 1982; See

also Editorial, Dear Century Club, N.Y. Times, Jan. 13, 1983, at A22, col. 1.

The importance of contacts is understandable. Contacts are a major source of productive job placement leads. According to the United States Bureau of Labor Statistics, almost one-third of all jobs held by males come through personal contacts. Job Seeking Methods Used by American Workers, Bull. No. 1886, U.S. Bureau of Labor Statistics, Table 3 (1972). Many people believe the percentage is actually higher for high-level jobs. C. Kleiman, Women's Network 2 (1980). See also, Kiechel, The Care and Feeding of Contacts, Fortune, Feb. 8, 1982, at 119. Entrée into the "Old Boys' Network" -- that series of linkages with influential elders, ambitious peers and younger men on their way up which men develop as

they move through school, work, professional and community service organizations, and private clubs -- provides men with knowledgeable allies who help them advance in their careers.7/

Every man who joins the U.S. Jaycees automatically becomes a member of an extensive and influential network which includes current members, alumni of the organization and non-member civic leaders who work closely with the U.S. Jaycees on community projects. Jaycee

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7/ For example, a corporation vice president in Minnesota, after a long peroration on how little contacts meant to him and his associates, said "Well, of course, it is true that in 15 minutes in the lobby of the Minneapolis Club you can see everybody you need to talk to in a week." Kiechel, The Care and Feeding of Contacts, Fortune, Feb. 8, 1982, at 119. See O'Brien, Women Helping Women, Detroit Free Press, Nov. 13, 1978; Causey, Old Girl Network Growing, Washington Post, Oct. 5, 1978, at C2, col. 1.

members have numerous opportunities to know and work with individuals from their peer group in the community. The age range of the Jaycees' membership (18-35) provides members with a chance to meet both ambitious peers with similar career goals, and senior members, slightly older, who can offer advice and information and serve as role models. Many of the Jaycees graduates, to whom members have access, hold influential positions in business and politics. As the Jaycees itself points out, "numerous past Jaycees are members of the Senate and the House of Representatives, as well as state legislatures ...." U.S. Jaycees, Service to Humanity: The Jaycee Future 2 (1969). Women are deprived of these contacts.

The U.S. Jaycees chooses to accord women "associate member" status

rather than to bar them entirely. This in no way ameliorates the harm women suffer. Denied full membership privileges -- the right to run for office, vote in elections or receive awards -- women members are branded as second-class citizens and treated accordingly. No matter how competent and active in the organization, the female Jaycee is deprived of an equal opportunity to improve her leadership skills, to distinguish herself, to develop necessary contacts, and to reap equally the rewards of organization, participation and involvement.

II.

THE EIGHTH CIRCUIT'S RULING IS CONTRARY TO THE HOLDINGS OF THIS COURT THAT THERE IS NO CONSTITUTIONALLY PROTECTED RIGHT OF ASSOCIATION THAT SHIELDS PUBLIC GROUPS FROM STATE ANTI-DISCRIMINATION LAWS

By recognizing a right to freedom of association that goes beyond any constitutionally protected interests that have been recognized by this Court, the Eighth Circuit has prevented the State of Minnesota from eliminating sex discrimination in large, publicly oriented civic organizations operating within the state. Minnesota has a strong policy, expressed in its legislative and judicial pronouncements, against all forms of sex discrimination in the public domain. See Minn. Stat. Ann. § 363.12(1)(3) (West 1966 & Supp. 1983) ("It is the public policy of this state to secure for persons in this state, freedom from

discrimination; In public accommodations because of ... sex ...."). The Minnesota Supreme Court has determined that the Jaycees is a public organization under state law, noting that the Jaycees engages in aggressive, unselective recruitment of men ages 18 to 35, that the national organization views its members as customers of the leadership and personality training offered by the organization, and that the leadership experience and opportunity to make personal contacts facilitated by full membership in the Jaycees provides a competitive edge recognized in the business community.

Notwithstanding the findings and conclusions of the Minnesota Department of Human Rights, the Minnesota Supreme Court, and the federal district court, the Eighth Circuit has concluded

that the state is constitutionally constrained to tolerate the discriminatory practices of the Jaycees. The court of appeals found this organization of approximately 300,000 members in 7,400 local chapters across the country, a "private group" in need of constitutional protection. The court virtually ignored the recruiting, leadership training, civic functions and events which the prior tribunals had found to predominate among the activities of the Jaycees organization. Instead the court saw the Jaycees as a group whose charter preached the "brotherhood of man" and whose character would be dramatically altered were women to become full members. The Eighth Circuit canvassed this Court's jurisprudence on the freedom of association, announced that it would not be bound by it, and proceeded to fashion

an associational right that would protect sex discrimination among the Jaycees. This decision should be reversed.

A. The constitutional right of freedom of association is limited to groups that facilitate the exercise of First Amendment rights.

This Court has formulated a right of association to facilitate the exercise of the textually explicit First Amendment rights. The limitation on the scope of this right is apparent in the cases. NAACP v. Alabama, 357 U.S. 449, 460 (1958), spoke of the right "to engage in association for the advancement of beliefs and ideas," a formulation reaffirmed in NAACP v. Button, 371 U.S. 415, 430 (1963), and Runyon v. McCrary, 427 U.S. 160, 175 (1976). Bates v. City of Little Rock, 361 U.S. 516, 523 (1960), discussed a "freedom of associa-

tion for the purpose of advancing ideas and airing grievances," while Shelton v. Tucker, 364 U.S. 479, 486 (1960), described freedom of association as "a right closely allied to freedom of speech." More recently Buckley v. Valeo, 424 U.S. 1, 22 (1976), found the constitutional significance of association in "amplifying the voice of [the association's] adherents." See also Raggi, An Independent Right to Freedom of Association, 12 Harv. C.R.-C.L. L. Rev. 1 (1977); L. Tribe, American Constitutional Law 700-03 (1978).

The Jaycees is not protected by the associational right embodied in these cases. As the record demonstrates, the organization is geared towards developing qualities of leadership, responsibility, and civic sophistication in its members. These activi-

ties lie outside the First Amendment, and their exercise in groups does not implicate a freedom of association.

It is true, as the Eighth Circuit recites, that the Jaycees over the years has occasionally taken positions on various political topics. So have labor groups and business organizations. It is absurd, however, to maintain that the political pronouncement of an otherwise economically and socially oriented entity could shield it from the reach of anti-discrimination laws. Otherwise, virtually all anti-discrimination laws, both state and federal, could be evaded simply by issuing a few statements on public affairs.

The Eighth Circuit, apparently recognizing that the Supreme Court's cases on freedom of association afford

questionable protection for the Jaycees, has fashioned an associational right untethered to First Amendment moorings. Announcing that "[its] decision is not controlled by precedent," 709 F.2d at 1576, the court of appeals has created a "species of association" that is broader than the explicit rights guaranteed by the First Amendment and is based on the "nebulous concept of substantive due process." 709 F.2d at 1568. In so doing, the Eighth Circuit has returned to the discredited era of Lochner v. New York, 198 U.S. 45 (1905), when progressive social legislation in the states was invalidated under the heading of substantive due process. The Eighth Circuit's decision has again cast the Constitution as an impediment to social progress in the states. The court of appeals has invoked substantive due

process to allow the Jaycees to flout state policy and perpetuate its practice of sex discrimination.

This Court should correct the Eighth Circuit's distortion of the doctrine of freedom of association so that the State of Minnesota may apply its Human Rights Act to the Jaycees.

B. The Constitution does not immunize public enterprises from state anti-discrimination laws.

This Court has held that the Constitution provides no safe harbor against the application of civil rights laws for enterprises operating in the public domain. In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), a case upholding the constitutionality of the federal public accommodation statute, 42 U.S.C. § 2000a, the Court noted:

> [N]o case has been cited to us where the attack on a state [public accommodation] statute has been successful, either in federal or state courts .... [T]he constitutionality of such state statutes stands unquestioned.

379 U.S. at 260. These statutes remained unquestioned until the decision in this case, the first instance in which a federal court has found a state public accommodation statute unconstitutional. See also Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) ("[A] claim of equal access to public accommodations ... is not a claim which significantly impinges upon personal associational interests.")

The analytic tools for distinguishing public from private entities are neither novel nor elusive. The principal focus of the criteria has clearly been on an organization's mem-

bership practices. Among the criteria are selectivity of the group in the admission of members, Tillman v. Wheaton - Haven Recreation Association, 410 U.S. 431, 438 (1973); Sullivan v. Little Hunting Park, 396 U.S. 229, 236 (1969); existence of limits on the size of membership; Nesmith v. YMCA, 397 F.2d 96, 102 (4th Cir. 1968), formality of membership procedures; Cornelius v. Benevolent Order of Elks, 382 F. Supp. 1182, 1203 (D. Conn. 1974); Wright v. Cork Club, 315 F. Supp. 1143, 1153 (S.D. Tex. 1970), attributes of self-government and member ownership; Daniel v. Paul, 395 U.S. 298, 301 (1969), and the existence of advertising directed to non-members; Runyon v. McCrary, 427 U.S. 160, 172 n.10 (1976).

A recent unanimous decision of the New York Court of Appeals, U.S. Pow-

er Squadrons v. State Human Rights Appeal Board, 59 N.Y.2d 401, 465 N.Y.S.2d 871 (1983) employed many of these factors to find an organization of power boating enthusiasts subject to the state's laws against sex discrimination. Like the Jaycees, the Power Squadrons offered social, civic, and educational programs. The court noted that the group "had no plan or purpose of exclusivity other than sexual discrimination ... encourage[d] and solicit[ed] public participation in their programs, courses and membership ... [and did not] direct publicity exclusively and only to the members ...." 59 N.Y.2d at 413, 465 N.Y.S.2d at 877. A challenge to the constitutionality of the state civil rights law as applied to the Power Squadrons was summarily dismissed with the observation that "'the

constitution places no value on [private discrimination].'" 59 N.Y.2d at 413, 465 N.Y.S.2d at 877, quoting, Norwood v. Harrison, 413 U.S. 455, 469 (1973).

Employing this same approach, the Minnesota Supreme Court and the district court found the Jaycees to be a public organization for the purposes of state and federal law. These conclusions were amply supported by the record. Members are referred to as "customers" and membership in the organization is referred to as "the product" or "the goods" in the organization's published material. Moreover, the sale of memberships occupies a tremendous amount of officers' time and recruitment achievement is recognized in the organization's awards system -- more than half of which deal with "record breaking performance in selling memberships."

United States Jaycees v. McClure, 305 N.W.2d 764, 771 (Minn. 1981). There are no published criteria by which members are selected, and no evidence in the record that any applicant for membership has ever been rejected -- except women applying for "full" membership rather than "associate" membership.

The court of appeals chose to depart from these accepted criteria for determining the public nature of an organization and substituted an analysis of the Jaycees' ideological goals, as distilled from the organization's charter. The court regarded the espousal of "faith in God," "free enterprise," and the "brotherhood of man [that] transcends the sovereignty of nations" as the key to the character of the Jaycee organization. 709 F.2d at 1570. Curiously, the Eighth Circuit found that these

noble creeds permeate all the Jaycees' activities, from its civil and business functions to its leadership training seminars. The Eighth Circuit made these findings despite recruitment literature that loudly announces "JAYCEES, THE PRODUCT you are selling, is outstanding from any angle. Jaycees is the 'best value' you can get." United States Jaycees v. McClure, 305 N.W.2d at 769, quoting, The Jaycees Recruitment Manual (emphasis in original). Not only is the court of appeals' "conception of the Jaycees ... based upon factual error." 709 F.2d at 1579-80 (Lay, C.J., dissenting), but the court has impermissibly substituted its judgment for the reasonable judgment of the state. The Supreme Court should reverse.

C. The Eighth Circuit has impaired the ability of the State of Minnesota to function in an area of vital local concern.

A more restricted view of the constitutional right of freedom of association in this case is appropriate to prevent the federal government from encroaching on state powers and prerogatives. This Court has long been sensitive to those aspects of our federal system which require the national government to tread carefully when called upon to interfere with state functions. See Railroad Commission v. Pullman Co., 312 U.S. 496, 498 (1941) (recognizing "sensitive area[s] of social policy upon which the federal courts ought not to enter" absent pressing exigency); Younger v. Harris, 401 U.S. 37, 44 (1971), (emphasizing "the notion of comity, that is a proper respect for

state functions"); National League of Cities v. Usery, 426 U.S. 833, 843 (1976), quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975) (federal government "may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system").

This is not an instance in which a state has chosen to flout overriding federal law or policy. Congress has forbidden discrimination on the bases of race, religion, color, and national origin in places of public accommodations, 42 U.S.C. §§ 2000a to 2000a-6, and discrimination, including sex discrimination, in places of employment, 42 U.S.C. §§ 2000e to 2000e-17. Many states, however, have chosen to go further. At least thirty-eight states and the District of Columbia have public

accommodation laws and more than half of these prohibit sex discrimination. Project, Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws, 7 N.Y.U. Rev. L. & Soc. Change 215, 292-93 (1978).8/

The wisdom of allowing the states a free hand to legislate where national policy has not crystalized has been captured in the oft-quoted remarks of Justice Brandeis:

8/ Like the tribunals in Minnesota, the Massachusetts Commission Against Discrimination has held the Jaycees subject to public accomodations laws in that state. See Fletcher v. United States Jaycees, Nos. 78-BPA-0058-0081 (Mass. Comm'n Against Discrimination Jan. 27, 1981). A contrary result was reached in United States Jaycees v. Richardet, 666 P.2d 1008 (Alaska 1983) (reversing lower court); United States Jaycees v. Bloomfield, 434 A.2d 1379 (D.C. 1981) (reversing lower court).

> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens chose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also Whalen v. Roe, 429 U.S. 589, 597 & n.20 (1977) ("[W]e have frequently recognized that individual states have broad latitude in experimenting with possible solutions to problems of vital local concern.").

Amici submit that there would be no risks and many benefits to this country if Congress were to formulate public accommodation laws forbidding sex discrimination in open, civically and economically influential organizations such as the Jaycees. In the absence of a national commitment, however, the

states that choose to stand in the breach should not be discouraged by the federal judiciary from doing so. As a member of this Court has noted:

> State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law -- for without it, the full realization of our liberties cannot be guaranteed.

Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 491 (1977). The obstacles which the Eighth Circuit has erected to prevent Minnesota law from promoting sexual equality in the state's communities and marketplaces must be removed if the state is to fulfil this vision.

III.

THE EIGHTH CIRCUIT ERRED IN HOLDING THAT THE MINNESOTA HUMAN RIGHTS ACT AS INTERPRETED BY THE STATE'S HIGHEST COURT IS UNCONSTITUTIONALLY VAGUE

The Eighth Circuit has also invalidated the Minnesota Human Rights Act as applied to the Jaycees because, in its view, the state court "introduced such an element of uncertainty [into the statute] as to make it impossible for people of common intelligence to know whether their organizations are subject to the law or not." 709 F. 2d at 1577. This vagueness analysis erroneously invalidated an otherwise unobjectionable statute, on account of one dictum in a carefully reasoned interpretation of the statute by the state's highest court. Because the Eighth Circuit has perverted Supreme Court doctrine and confused vagueness with the inevitable

imprecision of legislative drafting and judicial interpretation, this Court should reverse.

The Minnesota Supreme Court articulated clear standards for determining whether a civic organization falls within the state's Human Rights Act.

The Minnesota Human Rights Act, which forbids sex discrimination in places of public accommodation, Minn. Stat. Ann. § 363.03(3) (West 1966 & Supp. 1983), defines public accommodation to include "a business ... facility of any kind ... whose goods ... [and] privileges ... are ... sold, or otherwise made available to the public." Minn. Stat. Ann. § 363.01(18) (West 1966 & Supp. 1983). The Minnesota Supreme Court determined that the Jaycees organization is a business "in that it sells goods and extends privileges in exchange for membership dues;" that it

is a public business in that it "solicits and recruits dues paying members but is unselective in admitting them;" and that it is a public business facility "in that it continuously recruits and sells memberships at sites within the State of Minnesota." United States Jaycees v. McClure, 305 N.W.2d 764, 768 (Minn. 1981). In its decision the Minnesota Supreme Court focused on the panoply of training programs offered by the Jaycees to its members in order to enhance the members' professional prospects and on the organization's aggressive, non-selective recruitment practices. Given the court's careful analysis, it can hardly be said that the decision has left the Minnesota statute "vague and standardless." Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966).

With the criteria announced by the Minnesota Supreme Court, the Minnesota public accommodations law as applied to civic organizations is neither "a trap [for] the innocent by not providing fair warning," nor flawed by failure to "provide explicit standards" for the law's application. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982), quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). So long as the Minnesota Supreme Court's interpretation of the statute is given only prospective reach against the Jaycees, who are free to comply or cease operations within the state, the Jaycees cannot claim failure to warn. The organization now knows it is covered. The carefully reasoned opinion of the Minnesota court convincingly demonstrates that the court has

not arbitrarily brought the Jaycees within the scope of the Minnesota Human Rights Act, but has rendered an interpretation of the statute consistent with the intent of the statutory framers and within the mainstream of Minnesota civil rights law. A federal court must consider the state court's decision with a view towards upholding the state statute. See Grayned v. City of Rockford, 408 U.S. at 110; Flipside, Hoffman Estates, 455 U.S. at 494 n.5. Had the Eighth Circuit done so, it would have found that the state court decision clarifies rather than obfuscates the law.

The Eighth Circuit was inexplicably troubled by dictum in the state court opinion that distinguished the Jaycees and another organization not before the court. United States Jaycees

v. McClure, 305 N.W.2d at 771. Without explanation, the Minnesota Supreme Court stated that the Jaycees was not "analogous[ ] to private organizations such as the Kiwanis International Organization." The dictim of the Minnesota Supreme Court merely reflects possible difficulties in applying statutes to marginal cases. It may be that there are civic organizations that fall so close to the public-private line that it will be difficult to ascertain whether they are within the reach of the public accommodation law. A statute, however, continues to provide a "comprehensible normative standard" even when it is marginally imprecise. See Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971). That the law must struggle with differences of degree is not cause for invalidating a statute. As Justice

Holmes observed in LeRoy Fibre Co. v. Chicago, Milwaukee, & St. Paul Railway Co., 232 U.S. 340, 354 (1914) (Holmes, J., concurring in part and dissenting in part), "[t]he whole law [depends on differences of degree] as soon as it is civilized." Having failed to appreciate these principles, the Eighth Circuit has spawned an approach to the vagueness doctrine that threatens the accustomed interplay of the states' legislative and judicial branches. Accordingly, the Supreme Court should reverse.

CONCLUSION

For these reasons, the Court should note probable jurisdiction of

this Appeal and reverse the decision of the court of appeals.

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